Lord Stonefield Reporter August 6. 1770.

INFORMATION

FOR

LAUCHLAN DUFF Writer to the Signet, Purſuer,

AGAINST

WILLIAM INNES of Sandſide, Defender.

ALEXANDER, late Earl of Caithneſs, having died in December 1765, his moveable eſtate devolved upon his daughter Lady Fife; and ſhe, with conſent of the Earl her huſband, expede a confirmation as executrix dative to her ſaid father.

By the indolence and inattention of the late Earl of Caithneſs, ſundry ſmall debts owing by his neighbours in the country were outſtanding at his death. Theſe were reported to his executrix, and many of them were recovered without any queſtion or diſpute upon the part of the debtors.

In the year 1758 two of Lord Caithneſs's tenants had removed from his eſtate, and taken poſſeſſions from Harry Innes, late of Sandſide, the defender's father. Theſe tenants, at their removal, were in arrear to the Earl, who had threatned to detain their ſtocking and crop, till Sandſide interpoſed, and became bound to pay the arrears which theſe tenants owed to Lord Caithneſs.

Sandſide's debt for theſe arrears was outſtanding at the Earl's death, and was reported as ſuch to the executrix. It was conſtituted by

by two obligatory miſſives written in 1758, and addreſſed to Mr Alexander Pope a miniſter of the goſpel in that country, who aſſiſted Lord Caithneſs in the management of his affairs.

The firſt letter is of this date, and of the following tenor;

Sept. 28. 1758. "Reverend Sir, I received a copy of your charge, and the Earl "of Caithneſs's accompt againſt William Mein late removed "from Downreca, amounting to L. 524: 19: 10 Scots, rent-"crop 1758 included, and alſo of your charge againſt John "Simpſon, lately removed from Auchinbeiſt, amounting to "L. 89: 9: 6 Scots, beſides five bolls one firlot bear, and two "firlots one peck meal multure for crop 1758, and I hereby ob-"lige myſelf as cautioner for theſe ſums, which I ſhall ſee you "paid of on demand, after the uſual terms of payment are elap-"ſed, and for the above quantities of victual, without giving "the Earl any further trouble about the matter, providing theſe "men ſhall be allowed to carry away their crops now on the "ground, whenever they pleaſe, without any impediment; and "anent this you will pleaſe give proper orders to all concerned, "*that I may cauſe ſecure in ſome proper way in due time as much of "theſe crops as will indemnify myſelf.*"

Nov. 23. 1758. The other letter is of this date, and of the following tenor; "I have your ſtate of John-Campbell Borland's accompt with "the Earl of Caithneſs, of this date, which I have read to John "himſelf, making the balance of his arrears to my Lord, for crop "1758 and preceedings, the ſum of L. 901: 7 Scots money." The letter then mentions ſome claims of abatement which the tenant pretended to have againſt Lord Caithneſs, and it adds, "I "told him he behoved only to mention theſe things to my Lord, "referring them to his Lordſhip's own juſtice; and I hereby ob-"lige myſelf to ſee his Lordſhip paid of the above arrears accor-"dingly. I have no doubt but my Lord will allow the neceſſa-"ry time to convert the preſent crop into money."

Both theſe miſſives are holograph of the late Sandſide, and addreſſed to Mr Pope, who tranſmitted them to the late Earl of Caithneſs, in a letter of this date, and of the following tenor;

Feb. 4. 1761. "My Lord, I am very ſorry I kept the incloſed papers ſo long, "but I ſtill hoped to have the ſatisfaction to end thoſe matters "with Sandſide, but I find that he inſiſts for terms which I "could.

" could not grant, ſuch as to make up to John Campbell what he
" loſt by William Baillie of his crop. I therefore ſend your Lord-
" ſhip Sandſide's obligations, and an accompt of ſome other ar-
" ticles which will appear by the accompt which Sandſide ac-
" knowledges, and will be anſwerable."

Soon after Lord Caithneſs's death, Archibald Duff then manager for Lord and Lady Fife in Caithneſs, wrote to William Innes now of Sandſide, demanding payment of the ſums contained in the obligatory letters above recited; and, in return, received the following anſwer: " I received your's laſt night concerning an July 8.
" obligatory letter of my father's to the late Earl of Caithneſs. 1766.
" I ſhall write to my agent Mr Charles M'Kenzie, and if you be
" ſo good as write to my mother at Edinburgh, ſhe will order
" payment, as I am juſt going out of the country."

Sandſide having left the country, no further demand was made upon him for ſome time, bnt Lord and Lady Fife having granted a factory to the purſuer for recovering debts due to the late Earl of Caithneſs, he, in January 1769, made a demand on Sandſide's doer at Edinburgh for the ſums mentioned in the obligatory miſſives above recited; and he further claimed payment of a bill of L. 50 Sterling drawn by the Earl of Caithneſs for value upon William Innes ſome time of Sandſide, and accepted by him, bearing date the 7th day of July 1746, and payable the 1ſt of September then enſuing. This bill, with diligence upon it, had been found amongſt Lord Caithneſs's old papers, when they were brought over to Banff-ſhire, and the purſuer was uncertain, whether it had been paid or not, further than that the grounds of debt and diligence were in Lord Caithneſs's cuſtody, and no extraneous evidence of the payment to be ſeen.

After making this demand, the purſuer waited for ſeveral months, expecting that Sandſide would pay the ſums mentioned in the letters, and pay the bill, or give ſatisfying evidence that it had been formerly paid; but getting no ſatisfaction in either particular, the purſuer was laid under the neceſſity of conveening Sandſide in an action before this Court, libelling upon the foreſaid bill and obligatory letters, and concluding for the contents of the bill, with intereſt from the term of payment, and for the ſum of L. 1627 : 6 : 4 Scots, being the contents of the two obligatory

gatory letters with ſome other articles, according to an accompt given in with the ſummons, together with intereſt upon that ſum from the dates of the letters till payment of the money.

This proceſs coming in courſe of the rolls before Lord Stonefield Ordinary, it was pleaded in defence for Sandſide, 1mo, that no action lay on the bill on account of the long taciturnity, which created a preſumption that the bill was paid; and 2do, with reſpect to the obligatory letters, it was pleaded that the obligations thereby created were cautionaries, and conſequently fell under the ſeptennial preſcription of the act 1695.

Upon the cauſe being heard before the Lord Ordinary, his Lordſhip, of this date, pronounced the following interlocutor:

Dec. 7. 1769. "Having conſidered the foregoing minute of debate, bill and "obligatory miſſive libelled on, finds the defender liable to the "purſuer in the contents of the ſaid bill, and intereſt due there-"on as libelled; but, in reſpect of the defence offered with re-"gard to the claim founded on the obligatory miſſives, aſſoilzies "the defender therefrom, and decerns."

Both parties having repreſented againſt this interlocutor, and both repreſentations having been anſwered, the Lord Ordinary,

Feb. 7. 1770. of this date, pronounced the following interlocutor: "Having "conſidered this repreſentation for the defender, counter-repre-"ſentation for the purſuer, anſwers to both, and replies for the "defender, makes aviſandum therewith to the Lords, and or-"dains both parties procurators to give in informations thereon, "betwixt and next calling."

Subſequent to this deliverance, and before informations were exhibited, the defender recovered certain writings, tending to ſhow that the bill was paid. Theſe writings were communicated to the purſuer, who was ſatisfied with the evidence of payment ariſing from them; and accordingly agreed that *quoad* the bill, the defender ſhould be aſſoilzied; whereupon the Lord Ordinary recalled the foreſaid deliverance, with reſpect to informations, and ordered memorials to himſelf upon the queſtion, touching the validity and exiſtence of the debts created by the miſſives above recited; and, upon adviſing theſe memorials, the Lord Ordinary made aviſandum to your Lordſhips, and appointed parties to ſtate the queſtion in informations: In obedience to which, this is humbly offered upon the part of the purſuer.

Since

Since the defender recovered evidence to ſhow that the bill was paid, he has been pleaſed to argue, that the obligations in the foreſaid miſſives were in all probability extinguiſhed alſo, tho' the vouchers of extinction cannot be recovered. But, with great ſubmiſſion, any preſumption ariſing from the late diſcoveries, as to the payment of the bill, ſtrikes directly the other way. The bill appears to have been paid in 1746, in conſequence of diligence done upon it, in name of Mr Hew Crawfurd writer to the ſignet, to whom it had been indorſed for that purpoſe. The obligatory miſſives are granted only in 1758; and therefore it is certainly reaſonable to preſume, that as vouchers have been recovered, tending to inſtruct payment of the bill, ſo if the obligations in the miſſives had been diſcharged, the vouchers of that payment might alſo have been recovered with much more eaſe than the other.

And, with ſubmiſſion, it is impoſſible to preſume, becauſe the bill now appears to have been paid, that the obligations in theſe miſſives were alſo diſcharged. The two tranſactions took place at different periods, and the bill and miſſives were granted by different perſons. The bill was directly for a debt of the acceptor's, and diligence had been done upon it in the name of Mr Crawfurd, which would make the payment more punctual; whereas theſe obligatory miſſives were no foundation for ſummary diligence; they could be put in ſuit only by an ordinary action; and as they remained in the perſon of Lord Caithneſs, whoſe inattention is well known, it is eaſy to conceive how they might ly over, tho' the bill was paid, eſpecially as the bill appears to have been paid ten years or more before the laſt Sandſide granted theſe obligations.

With reſpect to the queſtion itſelf, it is admitted, that the obligatory miſſive letters now founded on are holograph, and ſubſcribed by Harry Innes late of Sandſide, the defender's father, whom he repreſents. There is no queſtion, therefore, but theſe letters were originally binding upon Sandſide; and that if the obligation ſtill ſubſiſts, the defender muſt now be liable in the ſums they contain. Neither of theſe points were diſputed; and the defence chiefly maintained was, that theſe miſſive-letters were cautionary obligations, falling under the act 1695, cap. 5. intitu-

led, *Act anent principals and cautioners*, and conſequently were cut off by the ſeptennial preſcription introduced by that ſtatute.

With reſpect to this point, it was obſerved for the purſuer in the general, that the defence was maintained by Sandſide, under the moſt unfavourable circumſtances. It is manifeſt from the letters themſelves, that he is not in the condition of a diſtreſſed cautioner, who has no proſpect of relief. On the contrary, it appears that his father was to be relieved of his engagements from the crops of the tenants, for whom he became ſecurity. Hence it is to be preſumed, that Sandſide did afterwards operate his relief from the effects of theſe tenants; and therefore it is pretty clear, that this defender is now refuſing to pay a debt for which his father was ſecurity, and whereof he recovered payment from the principal debtors.

More particularly the purſuer, with ſubmiſſion, apprehends, that however the ſeven years may have been elapſed from the date of theſe miſſives, to the time of making a demand upon this defender, yet he is barred from pleading any defence founded on the ſeptennial preſcription; becauſe, in his letter to Archibald Duff, then manager for Lord and Lady Fife, he in ſome meaſure acknowledges the debt, and refers Mr Duff to his mother, or his agent, for payment.

But, 2*do*, The purſuer is adviſed, in point of law, that theſe obligations are not of that nature, nor were they granted under ſuch circumſtances, as to be affectable by the ſeptennial preſcription of the act 1695. Thus the queſtion comes altogether to a point of law: For judging whereof, it is proper, in the *firſt* place, to obſerve, in point of fact, that the miſſives above recited, are not obligations granted by a cautioner at the original contraction of the debt, or with a view, by additional ſecurity, to induce the creditor to truſt his money. No money was advanced when Sandſide granted theſe obligations, and the debts which he undertakes to pay, had been contracted when the tenants fell in arrear, which muſt have been before the letters were written; ſo that in fact Sandſide's cautionary obligation was not *ſimul et ſemel* with the principal debt, but long after the principal debt was firſt contracted.

It is, with great ſubmiſſion, pretty clear, that ſuch obligations, tho' granted in ſecurity of another man's debt, do not fall under the

the ſeptennial preſcription. In the *firſt* place, it cannot be denied that the act 1695, introducing that preſcription, is correctory of the former law, to be ſtrictly interpreted, and not to be extended beyond the caſes meant and expreſſed in it.

2*dly*, In conſidering what obligations are comprehended under the foreſaid ſtatute, your Lordſhips muſt advert to the evil which the legiſlature had in view to redreſs by that act. The purpoſe of the act, as declared in the narrative, is to ſave families from being ruined by cautionary obligations. Now, the purſuer is adviſed, that families are in danger of being hurt only by cautionries, where the cautioner binds at the ſame time with the principal. Perſons are often induced to join their ſecurity in that manner, where the money is to be advanced, and where they have no reaſon to doubt of being properly relieved; but after the money is advanced, few people will engage their credit to ſave a debtor from diligence, when at the ſame time they have no proſpect of relief; and neither families, nor individuals, are in much danger of being hurt by cautionary obligations contracted in that manner.

From the purview of the ſtatute therefore, it is, with ſubmiſſion, clear, that ſuch cautioners only were meant to be therein comprehended, as bound themſelves at the original contraction of the debt, and not thoſe who interpoſed their ſecurity for the payment of a debt formerly contracted. And this diſtinction is clearly eſtabliſhed in the enacting words of the ſtatute itſelf. The ſtatutory clauſe is as follows: "Statutes and ordains, that no man "binding and engaging hereafter, for and with another, con"junctly and ſeverally, in any bonds or contracts, for ſums of "money, ſhall be bound for the ſaid ſums for longer than ſeven "years, after the date of the bond; but that from and after the "ſaid ſeven years, the ſaid cautioner ſhall *eo ipſo* be free from his "caution."

And it does not contradict this interpretation, that the following clauſe is added in the act of parliament: "And that whoever "is bound for another, either as expreſs cautioner, or as princi"pal, or co-principal, ſhall be underſtood to be a cautioner, to "have the benefit of this act; providing that he have either a "clauſe of relief in the bond, or a bond of relief a-part, intima"ted perſonally to the creditor at his receiving the bond." This

clauſe

clauſe is not meant to comprehend the obligation of every perſon who binds as ſecurity for the debt of another. The only purpoſe of it is to diſtinguiſh between principal and cautioner, when they bind in the manner ſet furth in the ſtatutory clauſe above recited; ſo that this laſt clauſe is explanatory of the former, and cannot be ſuppoſed to allude to any caſe but what was expreſſed in the former clauſe, namely, when the principal and cautioner both bind at the ſame time for the advance of the money, and when it is lent upon the credit of the cautioner as well as of the principal; and by no means when the cautioner accedes, and binds himſelf ſometime after the debt has been contracted.

And the purſuer has been adviſed, that the ſtatute has uniformly received this interpretation in the judgments of the Court. Thus, for inſtance, in the caſe between Gilbert Moir writer in Edinburgh and Sir Samuel Forbes of Foveran, decided 16th Feb. 1710, and obſerved by Mr Forbes; Gilbert Moir being creditor to Keith of Lentuſh by bond, and Sir Samuel, to ſtop diligence, having, by his letter to Mr Moir, obliged himſelf to procure ſecurity, or pay the debt between the date of the letter and Martinmas then enſuing; and Sir Samuel, when purſued for payment, having pleaded that he was only a cautioner, and conſequently was free, as no diligence had been done againſt him within ſeven years; "The Lords found, that Sir Samuel was not a cautioner in terms "of the act of parliament 1695, and therefore could not plead "preſcription."

And the queſtion was ſtill more recently and ſolemnly determined in the caſe of Cave againſt Spence, deci d 3d December 1742, obſerved in the ſelect collection of deciſions lately publiſhed. In that caſe an obligation had been granted upon the 22d October 1712, by David Spence ſecretary to the Bank of Scotland, to James Clark engraver of the Mint. It was granted in ſecurity of a bond for L. 60 owing by Mr Bannerman to James Clark, dated 22d November 1710; and in the obligation David Spence became bound, either that Bannerman ſhould pay the ſum in the bond with annualrent, or that he himſelf ſhould pay it. David Spence was purſued upon this obligation, and pleaded the ſeptennial preſcription. The purſuers made ſeveral anſwers to this plea, and the iſſue of this diſpute, as obſerved by the learned collector, was, "That the Court, without entering into any of

"the

" the ſpecialities which had been ſuggeſted by the purſuers, re-
" pelled the defence of preſcription for the following reaſon ſin-
" gly, *That no cautioner has the benefit of the ſtatute, but he who is*
" *bound along with the principal in the original bond, and not he who*
" *accedes* ex poſt facto."

The purſuer has troubled your Lordſhips only with a ſhort account of theſe deciſions, but upon looking into them, it will be found, that they are perfectly applicable to the queſtion now at iſſue; and, as no contrary deciſion is to be found in the books, it is unneceſſary to enlarge further upon the argument. The purſuer therefore flatters himſelf, your Lordſhips will have no difficulty about repelling the ſeptennial preſcription, and finding that theſe obligatory miſſives are ſtill binding on the defender as the repreſentative of his father.

There was another and a ſeparate plea maintained by the defender in bar of this claim. It was ſaid, that theſe obligations having been granted for arrears of rent due by tenants, and theſe tenants having removed ſeveral years ago from Lord Caithneſs's lands, the obligation upon them for payment of their rents was preſcribed by the act 1669, cap. 9. which bears, that maills and duties ſhall preſcribe, if not purſued for within five years after the tenants removal, and that as the principal obligation was preſcribed, the cautionary obligation of courſe fell to the ground.

The purſuer is adviſed, that few words will be neceſſary in anſwer to this plea. The act 1669 eſtabliſhes a preſcription only as to the mean of proof, and bygone rents may ſtill be purſued for after five years, if the claim can be eſtabliſhed either by writing or the oath of party; and therefore, that act of parliament has nothing to do with this caſe, where the obligation is proved by a moſt explicit writing.

And *2do*, It is not a fair view of this matter to conſider Sandſide merely as a cautioner for payment of the rents then owing by theſe tenants. He does not bind and oblige himſelf that the tenants ſhall pay their arrears, but he becomes bound himſelf to pay the arrears to Lord Caithneſs, and takes the chance of operating his relief from the tenants effects; ſo that as to Lord Caithneſs he ſubſtitutes himſelf in place of the tenants, and is in effect not cautioner but principal debtor, and the act 1669, anent

the preſcription of maills and duties is in no ſhape applicable to Sandſide's obligations in theſe letters.

Upon the whole, the purſuer flatters himſelf, your Lordſhips, upon conſidering the caſe, will have no difficulty to find the defender liable in the preſtations contained in his father's two obligatory miſſives, with intereſt upon the ſums for which he thereby bound himſelf, from the dates of theſe letters reſpectively till payment, and ordain an accompt to be made up on that footing.

In reſpect whereof, &c.

COSMO GORDON.